DEPARTMENT OF EXECUTORS, ADMINISTRATORS—WILLS.

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SOLINSKY *v.* FOURTH NATIONAL BANK OF GRAND RAPIDS. SUPREME COURT OF TEXAS.[1]

The assignee of a foreign administrator may maintain suit in a Texas Court for the collection of a promissory note, payable to the intestate, and to enforce a deed of trust made to secure its payment, in the absence of any Texas administration and Texas creditors, where the law of the foreign state has not been proved to deny the right of the administrator to make the transfer.

Opinion by HENRY J.

RIGHT OF ADMINISTRATOR TO MAKE TRANSFERS.

Under the system in England by which the goods of a decedent were administered in virtue of letters of probate or of administration granted by the ordinary, or by way of special prerogative from the metropolitan of the province, as the existence of *bona notabilia* in one or more jurisdictions made necessary (2 Bl. Com., 508, 509), little difficulty arose concerning the locality of personal property, such as household goods and movable chattels. But where the property consisted of choses in action, numerous disputes between the ordinaries made it necessary to establish for them some distinct *situs:* Att.-Gen. *v.* Bouwens, 4 M. & W., 171, 191. Specialty debts were accordingly held to belong to the jurisdiction where the specialties were found: Att.-Gen. *v.* Bouwens, 4 M. & W., 171, 191, Com. Dig. Administrator (B. 4), and simple contract debts where the debtor resided: Com. Dig. Adm. (B. 4), Yeomans *v.* Bradshaw, Carth., 373; 3 Salk., 70; Pipon *v.* Pipon, Amb., 26.

Considering the question, however, as between State and State, instead of between different ordinaries jurisdictions, since no country can give its laws any extra-territorial force, it is easy to perceive the logic of reasoning that, debtors can only be compelled to liquidate their debts in the country where the debtor may be found and the authority of the personal representative is also recognized: Story's Confl. of Laws, § 512.

On the same principle and in the same light specialty debts are not recognized by the law of England as always assets wherever found, but the *situs* of such debts at any particular time likewise depends on the ability of the administrator at such time to sue the debtor within his jurisdiction: Wharton's Confl. of Laws, § 615;

[1] Reported in 17 S. W. Rep., 1050. Decided November 13, 1891.

Huthwaite *v.* Phaire, 1 M. & G., 159. The early case of Daniel *v.* Luker (1571) Dyer, 305, is not inconsistent with such a view. The defendant, a native of Ireland, in a suit in England by an English administrator, on a bond which had never been out of England, pleaded a release by the Irish administrator. While the decision presumptively went on the ground that, the bond was an asset where it was found, yet the case can also be brought within the principle that the *situs* of the debt is that of the debtor. In Whyte *v.* Rose (1842), 3 Q. B., 493, an action was brought in England by the English administrator of an intestate dying in Ireland on a deed which was in Ireland at the time of his death, and it was contended that an Irish administrator alone could sue, but the Court of Queen's Bench, speaking through TINDALL, C. J., held the English grant of administration to be sufficient. Mr. FOOTE (Foote's Int. Jus., 2d ed., 279), having stated the facts of these two cases, says: "It is difficult to regard the *situs* of such a bond as the real locality of the assets represented by it, in preference to the country where the debtor must be sued." "A contract in one place makes a man a debtor in every place." Peacock *v.* Bell, 1 Wm. Saund. 73.

While as between the ordinaries in England specialty debts were given the chattel-like quality of being assets wherever found, the rule did not extend to the case of bills of exchange and promissory notes. In Yeomans *v.* Bradshaw (1728), Carth., 373; 3 Salk., 70, the point was directly in issue. The administratrix of a deceased payee of a bill of exchange brought an action in London against the drawer, by virtue of letters granted under the authority of the Bishop of Durham. Upon demurrer it was argued that, as trover would lie for the conversion of such a bill it must therefore be "goods and chattels" and should be considered *bona notabilia* wherever found, but Lord HOLT said, it was no more than a simple contract, *which followed the debtor*, and likened it unto an award in writing. (Cited with approval by Baron PARKE in Mondel *v.* Steele, 1 Dowl. Rep. (N. S.) 155; also in Wyman *v.* Halstead, 109 U. S., 656; Reynolds *v.* McMullen, 55 Mich., 568. See also Ingraham's Went. Exrs., 96; Atty.-Gen. *v.* Bouwens (1838) 4 M. & W., 171, 191; Rand *v.* Hubbard, 4 Met., 252).

On an information for probate duty, it appeared that, a resident of India having directed certain securities to be realized and the proceeds transmitted to his bankers in England, died while the proceeds of the sale, consisting of bills of exchange payable in six months after sight, drawn by a bank in India on a bank in London in favor of his bankers, were on their way to England. The bills having been duly honored and the money received by the defendant, the question was, whether the amount of the bills was subject to the duty. KELLY, C. B., in delivering his opinion, after stating that, he considered bills of exchange of the nature of personal chattels; because trover could be maintained for them, said, "secondly, on the ground which has been chiefly adverted to by my learned brothers, I am clear that the bills, or rather the money, property, or debt represented by them are liable for probate duty, namely, on the ground that where assets consist of debts,

they are assets where the debtor resides. There may, at first sight, seem to be some difficulty in applying this principle to the case, because at the time of probate no debt was due from any one. The drawer would only be under a liability in the event of the bill being dishonored, the drawee was under no liability; because he had not yet accepted the bill; there was therefore no actual debtor in existence. We are, therefore, driven to see who in fact became the debtor and provided and paid the money. Now the bills were presented for acceptance in due time; they were accepted and paid at maturity, the only persons, therefore, whoever became debtors were the acceptors. They were residents of London, and the money came to hand in London; the assets were therefore in London." AMPLETT, B., remarked: "Here the assets are represented by bills of exchange, which were then on their passage from India to England, but when the nature of a bill of exchange is considered, it will appear that they represent, but do not constitute the assets. The testator had ordered his agent to pay money to a bank in London. If this order had not been complied with, the testator would have had recourse to the drawer. But if it was complied with, and if either money or credit, which is represented by the bills of exchange was in London, then the assets were in London. If it had been otherwise, then the assets would have been in India:" Att.-Gen. *v.* Pratt (1872), L. R., 9 Ex., 140.

In the earlier case of Att.- Gen. *v.* Bouwens (1838), 4 M. & W., 171, 192, a bill of exchange payable out of England was considered an instrument of chattel nature capable of being transferred in England by the English administrator. The authority on which Lord ABINGER supports his opinion (PARKE, doubtless concurred), appears to be § 517 of Story's "Conflict of Laws." (See Westlake's Priv. Int. Law, § 88.) Adopting also § 516 to more clearly express the idea, it is there written: "If a foreign administrator has, in virtue of his administration, reduced the personal property of the deceased, there situated, into his own possession, so that he has acquired the legal title thereto according to the laws of that country, if that property should afterwards be found in another country, or be carried away or converted there against his will, he may maintain suit for it there in his own name and right personally, without taking out new letters of administration; for he is, to all intents and purposes, the legal owner thereof, although he is so in the character of trustee for other persons. The plain reason of such case is, that the executor has, in his own right, become full and perfect owner of the property by the local law; and a title to personal property duly acquired by the *lex loci rei sitæ*, will be deemed valid and will be respected as a lawful and perfect title in every other country. The like principle will apply where an executor or administrator, in virtue of an administration abroad, becomes there possessed of negotiable notes belonging to the deceased which are payable to bearer; for then he becomes the legal owner and bearer by virtue of his administration and may sue thereon in his own name; and he need not take out letters of administration in the State where the debtor resides, in order to maintain suit against him.

And for a like reason it would seem that negotiable paper of the deceased payable to order, actually held and endorsed by a foreign executor or administrator in the foreign country, who is capable there of passing the legal title by such endorsement, would confer a complete legal title on the endorsee, so that he ought to be treated in every other country as the legal endorsee, and allowed to sue thereon accordingly in the same manner that he would be if it were a transfer of any personal goods or merchandise of the deceased, situated in such foreign country."

"The maxim of the law of the civilized world is, "*mobilia sequentur personam*," and is founded on the nature of things. When *mobilia* are in places other than that of the person to whom they belong, their accidental *situs* is disregarded, and they are held to go along with the person." (Lord SELBOURNE in Freke *v.* Lord Carbery, L. R., 16 Eq., 466; Foote's Int. Jus., 2d ed., 224; Story's Confl. of Laws, § 380.) But, in the words of Judge BUTLER (Carmichael *v.* Ray, 1 Rich. 116), "it is a mistake to suppose that, upon his death, his legal representatives, appointed under the laws of his domicile, are invested with like title and power as to all such property; while the owner when alive is, clothed with this authority, yet his death is an event which changes the character of the title, and invests new parties with power over his estate:" Dial *v.* Gary, 14 S. C., 573.

No nation is under any obligation to enforce foreign laws to the prejudice of the rights of its subjects. It has been well said "the duty of every government is to protect its own citizens, and especially the rights of creditors as the material and commercial prosperity of a country depends greatly on this protection and security. If a government fails in this, it fails in one of its most important functions and duties. To this end, therefore, it is well understood that the different governments in which the movable property of a deceased may be left, upon his death, are authorized to intervene and take control. Hence, in every State, we find laws declaring in whom such property, within its limits, shall vest, and in what manner it shall be administered:" SIMPSON, C. J., in Dial *v.* Gary, 14 S. C., 573. The title of an executor or administrator, derived from a grant of administration, cannot *de jure*, as a matter of right, extend beyond the territory of the government which grants it. The title acknowledged in another is acknowledged from comity. Reason is against extending the comity. "It would be a great hardship upon the creditors of a decedent in any country to allow a foreign administrator to withdraw the assets of his estate without the payment of their claims, and leave there to seek their remedy in a foreign jurisdiction, and, perhaps, then to meet, with obstructions and inequalities in the enforcement of their rights from the peculiarities of the local law:" Story's Confl. of Laws, § 512. This policy grows more important with the possibility of the decedent being insolvent, because the *lex fori* determines the priority of claims: Story's Confl. of Laws, §§ 524 and 525; Wharton's Confl. of Laws, § 622. Agreeably to these considerations it has been the general rule that, neither an executor or administrator may

maintain a suit in a foreign country, unless he has obtained a new grant of administration, or has qualified as required by the local laws: Story's Confl. of Laws, § 512.

Where the property is "movable, tangible property, such as horses, cattle, wares and merchandise, the foreign administrator cannot sue for their recovery from want of title. The same want of title prevents any recognition of his transferee:" Dial *v.* Gary, 14 S. C., 573.

But it has been said that "an assignment by an administrator of a chose in action in the State where he is appointed, and which is good by its laws, will enable the assignee to sue in his own name in any other State, by whose laws the instrument would be assignable, so as to pass title to the assignee, and enable him to sue thereon:" Story's Confl. of Laws, § 359. Trecothick *v.* Austin, 4 Mason, 16 (opinion by Story), was cited as being founded on this doctrine, although it is no authority for such a proposition. There are cases, however, in the United States which do maintain such a rule. In Wilkins *v.* Ellet (1882), 108 U. S., 256, Mr. Justice GRAY said: "The administrator, by virtue of his appointment and authority as such, obtains the title to promissory notes and other written evidences of debt, held by the intestate at the time of his death, and coming to the possession of the administrator, and may sell transfer and endorse the same; and the purchasers may maintain actions in their own names against the debtors in another State, if the notes are negotiable promissory notes, or if by the law of the State, the assignee of a chose in action may sue in his own name." This was but a re-statement of the law, established in the same court in Harper *v.* Butler (1829), 2 Pet., 239. An executor assigned a note which was payable to the deceased absolutely, without any negotiable words. It was decided that the debtor might be sued in another State, if, by the law where the assignment was made, the legal title passed, and by the law of the *forum*, the assignee could sue in his own name.

This was the first case in which such a doctrine was promulgated. No counsel appeared for the defendant, no authorities were cited by counsel or the court, and the opinion is very meagre. Andrews *v.* Carr (1853), 26 Miss., 579, and Owen *v.* Moody (1855), 29 Miss., 79, follow the same principle upon a like form of contract, but the former is as unsatisfactory as Harper *v.* Butler.

Leake *v.* Gilchist (1829), 2 Dev. (N. C.), 73, went broadly on the ground that debts due by *specialty* are assets for administration wherever the specialty is found. In admitting the right of the assignee of a foreign administrator to sue, it was remarked that, the evil of permitting a withdrawal of the assets out of the State to the inconvenience of creditors, could only arise in this class of debts, and could not be alarming; because they formed usually but a small portion of the assets of an estate. Grace *v.* Hannah (1858), 6 Jones' Law, 94, and Smith *v.* Tiffany, 16 Hun., 552, are parallel decisions.

A chose in action, by its very name, signifies a thing or property of which the owner has not the possession, but merely a right of action for its possession: 2 Bl. Com., 389; Dial *v.* Gary, 14 S. C.,

573. The idea contains two elements, the property itself and the right to obtain possession of the property. An instrument which shows the title in the owner, is but a representative or shadow. This evidence of the property may be in one jurisdiction, the property in another: Dial *v.* Gary, 14 S. C., 573.

The English law, as between country and country, recognizes the distinction: Whyte *v.* Rose (1842), 3 Q. B., 493; Wharton's Confl. of Laws, § 615; Foote's Int. Jus., 2d ed., 279. An American case also accords with this view. The question was, whether the plaintiff, a holder of a bond, purchased by him from a foreign domicilliary administrator, had the legal right to sue the debtor in South Carolina: "SIMPSON, C. J., in delivering the opinion of the Court, said: The chose or thing is situated in South Carolina, and the evidence of right to sue, at the death of the intestate, was in Massachusetts, but that right could not have been exercised in that State even by the owner of the bond himself, at least, so long as the debtor continued in South Carolina, and according to strict law, ought to be subject to administration in South Carolina: Dial *v.* Gary (1880), 14 S. C., 573.

In Peterson *v.* The Chemical Bank (1865), 32 N. Y., 21, the point was as to the right of a foreign executor to assign a debt, due by the defendant bank to his testator, and evidenced by a bank book. The contract was so drawn as to indemnify the assignee of the fund for any expenses incurred in its collection, the design being to avoid the founding of an administion in the State where the bank was situated. DENIO, C. J., who delivered the opinion, considered the disability of the foreign executor to sue, as attaching to his person and not to the subject matter of the action, and sustained the suit.

The effect of the instrument depends on the attitude of the sovereignty in which the property is situated. Because an instrument is negotiable in both the country of the contract and the country of the *forum*, and in the country of the *forum* the assignee of a "lawful man" (Pollock on Contracts, 49), is entitled to sue in his own name, it does not follow that an administrator may transfer an enforceable title: See Yeomans *v.* Bradshaw, Carth., 373; Dial *v.* Gary, 14 S. C., 573; Thompson *v.* Wilson, 2 N. H., 291; McCarthy *v.* Hall, 13 Mo., 480; Slocum *v.* Sanford, 2 Conn., 533; SHERWOOD, J., in Reynolds *v.* McMullen, 55 Mich., 568; Stearns *v.* Burnham, 5 Greenl. (Me.), 261. To maintain such a doctrine would "defeat the great object of each State or government retaining control over the property of an absent decedent, the rights of domestic creditors might be wholly destroyed, and the laws providing local administration under local authorities for the protection of such creditors eluded and overthrown:" SIMPSON, C. J., in Dial *v.* Gary, 14 S. C., 573; SHERWOOD, J., in Reynolds *v.* McMullen, 55 Mich., 568; Stearns *v.* Burnham, 5 Greenl. (Me.), 261. The transferee would be given a greater right than he from whom title was obtained. The principle of law that, a person by an execution of a power, may often confer an enforceable title where he himself could not have sued (see Rand *v.* Hubbard, 4 Met.), does not apply:

Dial *v.* Gary, 14 S. C., 573. A personal representative is of an artificial *status* peculiar to himself, which can neither be compared to the *status* of infants, married women, lunatics, corporations or assignees in bankruptcy: (As to assignees in bankruptcy, see Goodwin *v.* Jones, 3 Mass., 517.) No distinction between executors and administrators can be made. That fanciful idea must be fully answered by the inability of a government to give its grant of letters testamentary any extra-territorial effect: Story's Confl. of Laws, § 512.

These considerations would exclude all contracts of an administrator for the transfer of assets of the estate not reduced to possession and in a foreign jurisdiction. Nor do the decisions limit the extent of their application. But due regard to the peculiar character internationally conceded to promissory notes and bills of exchange payable to *order* or *bearer*, makes an examination of their practical operation desirable. According to the Lex Mercatoria adopted by England, "the absolute benefit of the contract is attached to the ownership of such instruments, which according to the ordinary rules would be only evidence of the contract. The proof of ownership is then facilitated by prescribing a mode of transfer which makes the instrument itself an authentic record of the successive transfers. Finally, this proof is dispensed with by presuming the *bona fide* possessor of the instrument to be the true owner" (Pollock on Contracts, § 17).

The English case cited by Story in § 517 of "Conflict of Laws," to support his theory of a personal representative being capable of giving an assignee of such instruments an enforcible title against a foreign debtor, is McNeilage *v.* Holloway (1818), 1 B. & A., 218, deciding that a husband is entitled to sue alone on a bill of exchange given to his wife before marriage, an analogy being drawn between such instruments and personal chattels. But another and later English case also cited, Richards *v.* Richards (1831), 2 B. & Ad., 447, does not maintain the chattel-like quality. The American authorities relied on by Story are Robinson *v.* Crandell (1832), 9 Wend., 425, and Barrett *v.* Barrett (1832), Greenl. (Me.), 353. In Barrett *v.* Barrett an administrator in New Hampshire sued in his own name on a note drawn in favor of his intestate and endorsed by him in blank. The jury found substantially, the suit to have been brought for the benefit of the estate. But the Court considered the question as one for the application of the ordinary rules governing such notes, and the circumstance of the plaintiff really being a trustee, a fact which could not affect the liability of the defendant. And it was said, *if any matter of off-set existed against the estate it might be availed of in defence of the action, on the theory that the plaintiff took with notice of such equities.*

In the New York case of Robinson *v.* Crandell, decided in the same year, SUTHERLAND, J., said: "The notes being payable to *bearer* and the payee having died in Pennsylvania, admitting the plaintiffs to have been his administrators there, and in that manner to have obtained possession of the notes, I see no legal objection to their maintaining an action upon them in their own names as bearers. As

administrators they could not sue here. Letters testamentary or of administration granted abroad give no authority to sue here; we take no notice of them. But being the real owners of the note they had a right to declare as bearers and recover in that character. A mere agent having a note of his principal, payable to bearer, may sue on it in his own name, and it does not lie with the defendant to object to the plaintiff's want of interest."

The benefit of the exception of promissory notes overcoming the rule that on a decedent's death debts acquire the *situs* of the debtor, together with the policy which such a rule embodies seems, therefore, to be reasoned on the doctrine that in a suit on a note payable to bearer, suing for the advantage of another does not alter the principle of liability.

Before discussing whether any other than Story's idea is practicable, the other cases bearing on the question in the United States will be considered.

Robinson *v.* Crandell and Story's § 517, "Conflict of Laws," as applied to notes and bills payable to *bearer* are sustained by Knapp *v.* Lee (1879), 42 Mich., 41; Sandford *v.* McCreedy (1871), 28 Wis., 103; Wharton's "Confl. of Laws," § 615. In Campbell *v.* Brown (1884), 64 Iowa, 425, the endorsement was from the executor to a third person, who was legatee of the notes under a will. And Giddings *v.* Green (1880), 4 Hughes, C. Ct., 446, permitted foreign executors to sue as such and to subject a piece of land to the lien of purchase money. This last case is certainly much broader than Story's idea of the law, and no other authority can be found where the character of an instrument which was the property of the decedent altered the disability of the foreign administrator to sue: See § 512, Story's "Confl. of Laws.

Where an administrator has actual possession of a note or bill payable to *order*, Story maintains the chattel nature of the instrument should permit him to invest his transferee with an absolute title: Confl. of Laws, § 517; see also Rand *v.* Hubbard, 4 Met., 14; Goodett *v.* Anderson (1881), 7 Lea (Tenn.), 286; St. John *v.* Hodges, 9 Bar. (Tenn.), 334.

Thompson *v.* Wilson (1820), 2 N. H., 291, recognized and applied the opposite rule. Debts due on simple contract were said to be *bona notabilia* where the debtor lived, and consequently the foreign executor had no interest to assign. The same idea was more clearly expressed in Stearns *v.* Burnham, 5 Greenl. (Me.), 261: "The power of this executrix, by law, is to administer all the goods, chattels, rights and credits which are within Massachusetts. Debts due to the testator, at the time of his death, from persons residing in other States, are placed by law on the same grounds as goods and chattels belonging to him and being in another State. Once there she, as executrix, deriving her authority under the laws of Massachusetts, has no control. We are then led to inquire how an executor or administrator, acting under the authority derived from another State, can, by indorsing a note due from one of our citizens, give to his endorsee a power which he himself does not possess; that is, of successfully suing and recovering in our courts. If this can be done it will be an indirect mode of giving op-

eration, in this State, to the laws of Massachusetts, as such; or in other words, authority derived directly from her laws, which are not in force in this State. By adopting such a principle, the effects or credits of a testator or intestate found in this State might be withdrawn, which may be necessary for satisfying debts due from such testator or intestate to citizens of this State."

In McCarthy *v.* Hall, (1850) 13 Mo., 480, RYLAND, J., added, "Were our courts to permit the executors or administrators of a foreign State to sue or maintain actions on notes and bonds due to their testators or intestates by the citizens of our State, or to permit their assignees to sue, all the effects, goods and chattels, of such testators or intestates might thereby easily be withdrawn from our jurisdiction to the prejudice and injury of our citizens. Such is never suffered or permitted. It is our duty to guard the interest of our own citizens, to look well to our own household first. *Nostrum jus, magis quam jus alienum, servemus.*"

So in Connecticut, where suit was brought by an administrator on a note payable to the intestate or order, a payment to the ancillary administrator at the domicile of the debtor was held a discharge as against a subsequent suit by the principal administrator who held the note: Slocum *v.* Sandford, 2 Conn., 534. See also the opinion of SHERWOOD, J., in Reynolds *v.* McMullen, 55 Mich., 568.

Gove *v.* Gove, 64 N. H., 503, however overruled the principles stated in Thompson *v.* Wilson, 2 N. H., 291, and Barrett *v.* Barrett, 8 Greenl. 346, makes no mention of Stearns *v.* Burnham, 5 Greenl., 261, although upon an almost similar point.

Riddick *v.* Moore (1871), 65 N. C., 382, presents a phase of this question. The administrator in Virginia sent a note to an agent in North Carolina, who there assigned it to the plaintiff. PEARSON, C. J., in delivering the opinion of the Court, said: "While the note could not be sued on by the Virginia administrator, yet for all matters *in pais* he had a right to send it to North Carolina for sale and assignment. In deducing title the letters of administration granted in Virginia and the assignment though made in North Carolina had the same legal effect as a bill of sale for a horse, executed in North Carolina, had he sent the horse to North Carolina and sold it as he did the note." Lucas *v.* Bryne (1871), 35 Md., 485, only differed from this last case in that the administrator in his fiduciary character transferred the note to himself in his personal character in the State where suit was brought.

It is difficult to sustain the correctness of the contract principles involved in the last two cases. The power of an administrator is confined to the jurisdiction of his appointment, and, therefore, his contracts in a foreign State as administrator must lack that quality, since it is impossible to completely dispose of the contract necessary to transfer the instrument, in the chattel quality of the instrument. In both these cases the contract was made in a State foreign to the qualification. In the latter, the jurisdiction of the contract is express. In the former, although the agency would be governed by Virginia law, the contract of the principal through the agent would be regulated by the law of North Carolina.

In Rand *v.* Hubbard, 4 Met., 252,

several questions were suggested as making the *situs* of the debt that of the debtor impossible of application to bills of exchange and promissory notes. It was asked: If an endorsement can only be made by an executor or administrator appointed and authorized in the State where the debtor dwells, what is an endorsee to do who holds a note with a promissor and several endorsers living in different States? Must it be endorsed by one administrator so as to give a right of action against the promissor, and by another administrator so as to give a right of action against each endorser?

The title of an administrator who has a right of action to a fund is certainly stronger than the title of one who has no such right. When the fund is received by the administrator from the sale of the note it becomes an asset of the estate in his jurisdiction. If on failure of payment by the promissor the transferee should sue the administrator on his contract of endorsement, the position of the administrator would be the same as if the other rule were to be applied. The liability of the other endorsees to the holder of the note should be no less; for the administrator, should they alone be sued, still holds the fund obtained from the sale of the note as an asset to be used in the satisfaction of debts or the payment of legacies.

Where a note is payable to *order* a prospective purchaser would be charged with notice of its being an asset of the estate, since the right to receive payment would appear in the decedent and the endorsement be made by another person. But if the note was payable to *bearer*, it is clearly possible for a holder to be entirely without notice of the personal representative being in the chain of title, and against such a holder that circumstance could not defeat a recovery.

In bills of exchange another contingency is developed. The bill may not have been presented. Until acceptance, therefore, it would be impossible to relegate the *situs* of the note to either the jurisdiction of the drawee or the drawer. The *drawee* would be protected in accepting and paying the bill to an administrator appointed in *his* jurisdiction, and there is no reason to suppose that the same rule would not apply, were payment to be made to his endorsee: Att.-Gen. *v.* Pratt, L. R., 9 Ex., 140.

According to Yeomans *v.* Bradshaw, Carth., 373, however, presentment does not have to be made by the administrator deriving his appointment from the country of the *drawee*. And by the same case suit could only be brought against the *drawer* by the administrator recognized in his jurisdiction.

The drawee of a bill held by a foreign administrator or his transferee, to protect himself should, therefore, always decline to accept the draft, unless the rule obtains within the country where such presentment is made that, a voluntary payment to such an administrator is a good discharge in the absence of local administration.

While a doctrine of notice as applied to this question is not known to have been announced by any authority, it seems a not impracticable solution. That there must be something wrong with the chattel idea of Story is readily discernible when the effect of a collateral security is considered.

Bonds of governments, bonds and

stocks of corporations and real securities are often given as collateral security for the principal debt.

Where the bonds of a government pass freely from hand to hand without any additional transfer in the country from which they have been issued, they are practically money, and had Att'y-Gen. *v.* Bouwens, 4 M. & W., 171, not compared such instruments to foreign bills of exchange, there seems little doubt that Westlake (Westlake's Priv. Int. Law, § 88), would not have considered § 517 Story's "Confl. of Laws," to be the law of England. (Foote does not, however, seem to entertain this view. See Foote's Int. Jus., 2d ed., 282.) Should the additional transfer be necessary the *situs* of the asset is deemed to be the *situs* of the debtor. Atty.-Gen. *v.* Dimond, 1 C. & J., 356; Att.-Gen. *v.* Hope, C., M. & R., 530; 8 Bligh, 144.

New York conforming to the principle subsequently expressed in Peterson *v.* The Chemical Bank, 32 N. Y., 21, took the opposite view of the stock of a corporation: Middlebrook *v.* Merchants' Bank, 27 How. Pr., 474. Throughout the United States the bonds of the United States Government have no particular *situs*, Vaughan *v.* Northup, 15 Peters, 1; Shakespeare *v.* Fidelity Ins. Co., 97 Pa. St.. 173.

The nature of mortgages depends on the law of the State where the land is situated. STORY says (§ 424 Confl. of Laws): "The general principle of the common law is, that the laws of the place where immovable property is situated, exclusively govern in respect to the rights of the parties, the modes of transfer and the solemnities which should accompany them. The title, therefore, to real property can be acquired, passed and lost only according to the *lex rei sitæ*.

In Cutler *v.* Davenport, 1 Pick. (Mass.), 81, the question was as to the effect of an assignment of a bond and mortgage by a foreign administrator, and it was decided that, although for certain purposes the transfer might be considered as an assignment of a chose in action, with collateral security for its payment, yet as the land might eventually be held as an absolute estate under the mortgage, should it be foreclosed, the conveyance was necessarily sufficient to transfer the land. And that in the transfer of land which is governed by the *lex sitæ*, the foreign administrator would not be recognized. (See also Reynolds *v.* McMullen, 55 Mich., 568, where the same principles were applied, the question being similar, except that statute law distinguished between foreign personal representatives and those in Michigan although not upon the express case.)

New Hampshire and New York have considered mortgages mere personalty capable of transfer by a foreign administrator, and the Texas case forming the subject of the annotation takes the same position with regard to the deed of trust. Gove *v.* Gove (1886), 64 N. H., 503; Smith *v.* Tiffany (1879), 16 Hun. 552, and Solinsky *v.* Fourth Nat. Bk., 17 S. W. Rep., 1050.

In Doolittle *v.* Lewis (1823) 7 John's Ch., 45, an administrator in Vermont held a bond secured by a mortgage on lands in New York. The mortgage contained a power to the mortgagee, his executors, administrators and assigns in case of default in payment, to sell and convey the premises according to the laws of that State. Chancellor

KENT held this clause to be a special power given by the mortgagor, not derived from any court in another State, and authorized its execution in New York by a personal representative of the mortgagee appointed in Vermont, where the mortgagee died, saying, the power and the execution of the power were a matter of private contract between the parties and not of jurisdiction. (See also Averill *v.* Taylor, 5 How. Pr., 476, and Hayes *v.* Frey (1882), 54 Wis. 503, where this doctrine was adopted.)

Where the instrument representing the principal debt may be transferred but the collateral security is incapable of transfer except by a local administrator, a curious question arises as to what right the transferee has to enforce the principal security. Surely this fact should not overthrow the theory on which the contract of a foreign administrator is permitted to invest his assignee with an enforceable title to a negotiable security. Nor should it be capable of the same influence on the chattel idea announced by STORY in § 517 Conflict of Laws. It is significant that the cases in which the promissory note had no collateral security were all founded on the chattel doctrine. But in those in which a mortgage existed to secure the debt, the contract rule was adopted. Campbell *v.* Brown (1884), 64 Iowa, 425; Gove *v.* Gove, 64 N. H., 503. In Cutter *v.* Davenport, 1 Pick., 81, the question was before the Court and was suggested by counsel, but the opinion merely decided against permitting a foreign administrator to transfer a mortgage on land in Massachusetts, without noticing the effect of their action on the principal obligation which the mortgage was given to secure. The contingency seems to have impressed the Supreme Court of South Carolina in Dial *v.* Gary, 14 S. C. 573, for in the face of a tendency on all sides to follow STORY, the nature of a bond was considered and an opposite view taken.

In Reynolds *v.* McMullen, 55 Mich., 568, the tactics of the Court in Cutter *v.* Davenport were pursued by all but SHERWOOD, J., who attacked the chattel character of a promissory note as the Court in South Carolina did the bond. The question was as to the right of the administrator of a decedent in Missouri to assign a note with a mortgage on land in Michigan, where the debtor resided, given to secure it. He said: "The real question in this case, upon the facts appearing upon this record, is this: Were the debts, owing by persons residing in this State to the deceased, assets to be administered by the Court in Missouri, or by the Court in Michigan? "By the common law debts due by specialty are esteemed to be the goods of the deceased where the securities are at the time of his death; but debts due by simple contract follow the person of the debtor, and are regarded as the goods of the deceased where the debtor resides at the time of the creditor's death: 3 Bac. Abr. (Wils. ed. (37-8; Toller's Law of Executors, 55; 1 Wms. Saund., 274, note 3; Speed *v.* Kelley, 2 Am. Rep., 553; Wyman *v.* U. S., 29 Alb. Law J., 194; Slocum *v.* Sanford, 2 Conn., 534. "I am unable to see any good reason for the distinction made between debts by specialty and by simple contracts, or why they should not all be deemed assets to be administered at the same place. The proceeds after the payment of

debts have all to be distributed according to the law at the domicile of the deceased; but such is the law as we find it, and a change is for the legislature, and cannot properly be made by this Court. There can be no question but that the note was a simple contract debt and subject to the law applicable to that kind of claims: Slocum *v.* Sanford, *supra;* 2 Cooley's Bl. Com., 510." "This Court has already decided that the debts in this State due to a person resident in another State, dying there, can only be enforced by an executor or administrator duly appointed here: Vickery *v.* Beir, 16 Mich., 50; Thayer *v.* Lane, Walk. Ch., 200; and such is the rule at common law: Story's Confl. Law, §§ 513, 514 and cases cited. The assignee of these claims, due from the debtor's in this State, stands in no other or better position than did the public administrator who made the assignment to him, and could confer no rights which he did not possess: Chapman *v.* Fish, 6 Hill, 554; Thompson *v.* Wilson, 2 N. H., 291, and payment to him is no defence to this suit: Dissoway *v.* Carroll, 4 Lans., 191; Vaughn *v.* Barrett, 5 Vt., 333; Pond *v.* Makepeace, 2 Met., 114; Riley *v.* Riley, 3 Day, 74; Glenn *v.* Smith, 2 Gill & J., 493; McLean *v.* Meek, 18 How., 16. The proper place for administering such assets must necessarily be where alone payment can be enforced against the debtor. I can come to no other conclusion upon the facts appearing upon this record. "It necessarily follows that the note and mortgage were assets to be administered in this State, and that the public administrator in St. Louis acquired no right to sell or dispose of the same in that State to any person, or any right to the possession or control of the note and mortgage, further than to safely keep them and deliver the same to the administrator here required, until after the estate in Michigan was settled and the debts there were paid: 2 Kent's Com., 433, 434; 2 Bl. Com., 509; Bac. Abr. 'Executor' E.; Byron *v.* Byron, Cro. Eliz., 472; Hilliard *v.* Cox., Ld. Raym , 562; Salk., 37; Whart. Confl. Laws, § 604.

"There is no doubt but that an executor or administrator may lawfully sell the personal estate of the deceased, unless prohibited at public or private sale without the order of the judge of probate, within the jurisdiction of the Court where such property is assets in his hands for administration. He may do so even at a discount, though the property sold be notes and mortgages: Burt *v.* Ricker, 6 Allen, 77; 3 Redf. Wills, 226, 229, 236; and the purchaser will take a good title thereto, provided the property was assets within the control and jurisdiction of the Court where administration was granted. He cannot make such sale, however, when he has not the right to enforce collection: Yeomans *v.* Bradshaw, Carth., 373; Tourton *v.* Flower, 3 P. Wms., 369; Isham *v.* Gibbons, 1 Bradf. Sur., 69; Story on Confl. Laws, §§ 512, 513, 514, 515*a*, 522, 523; McCarthy *v.* Hall, 13 Mo., 480; Chapman *v.* Fish, *supra;* Goodwin *v.* Jones, 3 Mass., 514; Riley *v.* Riley; *supra;* Stearns *v.* Burnham, 5 Greenl., 261; Harrison *v.* Sterry, 5 Cranch, 289; Dawes *v.* Head, 3 Pick., 138; Harvey *v.* Richards, 1 Mass., 423; Glenn *v.* Smith, *supra;*

Vaughn *v.* Barret, *supra;* Lee *v.* Havens, Brayt., 93; Thompson *v.* Wilson, 2 N. H., 291; Judy *v.* Kelley, 11 Ill., 211; Willard *v.* Hammond, 21 N. H., 382; Smith *v.* Guild, 34 Me., 443; Langdon *v.* Potter, 11 Mass., 313; Rorer Interstate Law, 248; Speed *v.* Kelly, 59 Miss., 47; Owen *v.* Miller, 10 Ohio St., 143; Abbott *v.* Coburn, 28 Vt., 663; Vaughan *v.* Northrup, 15 Pet., 1; Noonan *v.* Bradley, 9 Wall, 394; Willitts *v.* Waite, 25 N. Y., 577; Valle *v.* Fleming, 19 Mo., 454."

The greater number of direct decisions must be conceded to agree with STORY, both as to the rights of a foreign administrator of bills and notes, payable to order or bearer, and to the effect of the contract to transfer any other negotiable instrument. Peterson *v.* The Chemical Bank, 32 N. Y., 21, shows the extreme the latter doctrine can be legitimately carried to. The more frequent chance for the use of the former, is as dangerous, as the extreme of the latter.

No case has been found where the accident of local *creditors* or local *administration* has been said to alter the rule of liability. On the contrary, in Peterson *v.* Chemical Bank, 32 N. Y., 21, the exceptional feature of no local *creditors* was considered as not changing the principle. The express observation in the leading case of the fact that no domestic claimant for the fund has been *proved* on the trial, seems suggestive of such a circumstance being vital in Texas. The adoption of such a doctrine, however, would embarrass the already complicated condition of this branch of the law.

Judgment against one administrator is no evidence of a debt against another, a parting reason for the maintainance of the rule, "debts follow the debtor," in the international law of decedent's estates: Talmage *v.* Chapel, 16 Mass.; Slanter *v.* Cherworth, 7 Ind., 211; Taylor *v.* Barron, 35 N. H., 484; Low *v.* Bartlett, 8 Allen, 259; Jones *v.* Jones, 15 Tex., 463; Price *v.* Mace, 47 Wiss., 23; Brodie *v.* Bickley, 2 Rawle, 231; McLean *v.* Meek, 18 How., 16; McGarvey *v.* Darniel, 32 Ill. App., 226.

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